MEDICAL EXPERT TESTIMONY.

BY ALPHONSO T. CLEARWATER, LL.D.

It is evident that the methods now pursued in admitting medical expert testimony in civil and criminal trials do not efficiently subserve the ends of justice. Briefly, they are that any party to a cause selects and pays his own experts, invariably selecting those who are willing to sustain his contention by swearing to opinions favorable to it. The expert, on being called to the witness-stand, is interrogated as to his knowledge of the subject, when and how he acquired it and the extent and character of his experience. If the Trial Judge concludes, as usually he does, that the witness is qualified to express an opinion upon the question involved, his ruling determines the expert's competency and the admissibility of his testimony so far as the trial at bar is concerned. The result is that many incompetent men are permitted to testify to crude and erroneous opinions—as, sometimes, the Trial Judge lacks the ability to distinguish the real from the masquerading expert; sometimes, possessing that ability, he lacks the courage to exercise it; and it has happened that the Trial Judge has not been unwilling that a brilliant charlatan should testify to the most reckless opinions, provided thereby public attention was directed to the trial over which the Judge presided.

In England and her colonial possessions much the same method is pursued. In Germany, medical experts are appointed by the Judges and are obliged to serve under a heavy penalty. They are allowed their expenses and a reasonable sum for their time and trouble, which is paid by the State. They are not looked upon as witnesses for either party, but as aids to the Court in ascertaining the truth. Their social position is much enhanced, and the fact that a physician or surgeon has been appointed as an expert to testify in an important matter is looked upon as official

recognition of the high standard of his integrity and attainments. A similar course is followed in Austria, France, Italy, Spain, Holland and Belgium.

Both in England and America the existing method justly has been the subject of severe criticism by the Courts and the public, and attempts have been made to remedy it by Parliament and the Legislatures of some of the States. As a rule, these have failed because of the opposition of lawyers and physicians of secondary rank in both professions. The evils of the present system may thus be summarized:

1. There are no satisfactory standards of expertness, and thus the testimony of charlatans is invited;

2. The character of the evidence often given by so-called experts is partisan and unreliable;

3. Trials are prolonged and their expense is increased on account of the number of witnesses;

4. The contradictory testimony of experts of apparently equal standing, having the same opportunities for acquiring knowledge of the facts, has a confusing effect upon juries;

5. Unprincipled self-styled experts are sometimes unscrupulously hired to support causes by specious and untruthful testimony;

6. Some Trial Judges are prone to permit incompetent so-called experts to testify to opinions predicated upon widely unrelated facts, and to express views which are but the speculative vagaries of ill-informed minds;

7. The expert must depend for compensation solely upon the litigant for whom he testifies;

8. The litigant who has the longest purse can produce the most imposing array of experts;

9. The Bench sometimes permits the Bar to treat the accomplished and modest expert with studied contempt;

10. Some Trial Judges are disposed to convert important trials into spectacular dramas which not infrequently descend to comedy and degenerate into farce, with the result that the administration of justice is degraded.

Theoretically, an expert is a scientist solely interested in facts, who should retain absolute freedom of judgment and liberty of speech—which it is almost impossible to do where his emolument entirely depends upon the good graces of an employer. It is evident that the commercializing of scientific knowledge, where the

compensation for its acquisition and expression depends entirely upon the extent to which it contributes to the success of a litigant, lessens its accuracy and value. The opening years of the twentieth century witness an enormous development of and market for special knowledge. Controversy among experts thus becomes almost inevitable, especially under conditions where they lease their opinions, usually at a large price, to aggrieved and aggressive parties who may profit, either fairly or unfairly, by the doubts which they are deliberately employed to inject into the case. The increase in wealth, the multiplication of the wants of modern civilization, the colossal character of the interests daily requiring the arbitrament of courts of justice have resulted, therefore, in the gravest abuses in the introduction of expert, especially medical expert, testimony in testamentary and criminal causes, until it has come commonly to be believed that such witnesses are so biased that hardly any weight should be given to their opinions. As was recently said by the court of last resort in a New England State: "If there be any kind of testimony that not only is of no value at all, but even worse than that, it is that of the medical expert"; and by the Supreme Court of the United States: "Experience has shown that opinions of persons professing to be medical experts may be obtained to support any view."

The expert witness, to be free from embarrassment of any personal relations to or with the parties to an action, should have no client to serve and no partisan interests or opinions to vindicate. He should give his opinion as the advocate neither of another nor of himself. When he speaks, he should speak judicially, as the representative of the special branch of science which he professes, governed by the opinions of the great body of authorities in that branch, and in accord with the result of their most recent investigations. When this is done, and not until it is done, shall we have expert testimony rescued from the disrepute into which it has fallen. By the adoption of some such system the mature judgment of the best minds could be obtained, and the superficial opinions of quacks and mountebanks would not be thrust upon the jury to their confusion and the hindrance of justice.

The testimony of witnesses who are brought upon the stand to support a theory by their opinions is justly exposed to sus-

picion. They are produced not to swear to facts observed by them, but to express their judgment as to the views held by those who employ them; they are selected to express an opinion valuable to their employers—an opinion, there is reason to believe, which is the result of the employment, the payment and the bias arising out of it. Such evidence always should be cautiously accepted as a foundation for a judgment; in many cases it has induced unwarranted verdicts, discreditable to the administration of justice and detrimental to the public interests.

Especially grave are the scandals arising from the prevailing methods in trials for homicide. Despite the veneer of modern civilization, there exists in many men a disposition to right their own real or fancied wrongs by brushing aside the slow methods of the courts and taking the law into their own hands. This is particularly true in cases where a woman is involved. Man is still primitive in that he clings to the primal notion that woman is a peculiarly precious kind of property, any interference with which deserves and demands the immediate and severe punishment of the aggressor; when a man kills the intruder he believes that his fellow men will exonerate him in their hearts, and that they will do so by their verdict if he can furnish them with a pretext for doing so. Thus lawyers, playing upon this ineradicable primordial instinct, advise the hiring of accommodating medical experts to swear to a flimsy theory of temporary mental irresponsibility, with the belief, predicated upon long experience, that the jury will seize upon it as a basis upon which to render a verdict of acquittal. No less scandalous is the abuse of medical expert testimony in contests, real or feigned, over the wills of wealthy testators, advantage being taken of the primal notion that a man's nearest connections by blood are entitled to his estate. Thus, if a man of large wealth, for reasons of controlling importance to himself, divides his property unequally between his children, or, failing children, bequeaths it to his widow, and religious, educational or charitable institutions, his will frequently is contested by relatives whom he scarcely knew, sometimes whom he never heard of, and to whom, had he known them, he would not have given a dollar. The contest usually is predicated upon allegations of mental incompentency or undue influence, but really it is based upon an appeal to the primal sentiment in favor of equal distribution between relatives of the blood. Not-

withstanding the fact that over ninety per cent. of such contests are for purposes of blackmail, over sixty per cent. of them are compromised by the payment of a substantial sum to the contestant—the actual and legal beneficiaries too often being advised by conservative counsel that an unscrupulous adversary can hire abundant medical expert witnesses, of apparently fair standing, to testify to mental incompetency on the strength of the most trivial idiosyncrasies of conduct. The euphemism for this barbaric survival is "the unwritten law." Although, in both classes of cases, the medical expert is guilty of moral perjury and the lawyer who advises his employment is morally guilty of subornation of perjury, so common is the practice, so blunted are the sensibilities of the members of both professions and of the public that both the physician and the lawyer retain unimpaired their professional and social standing—in fact, they find more admirers than contemners because they profit largely by the performance.

The treatment of the fair-minded, thoroughly equipped man of science by the Bar and Bench cannot, however, be changed by legislation. Any improvement upon the existing method must originate with and be carried out by the advocate and the Judge themselves. Both profess a desire for reform, but neither as a body, until recently at least, has undertaken to bring about reform in anything approaching a systematic or effective manner.

It is evident that the personal embarrassment of having to proclaim one's self an expert, or at least a reputed expert, is enough to disturb the normal operations of any highly trained mind.

The Bar has cultivated and is largely responsible for the fallacy that a witness is to be discredited if he can be disconcerted ("rattled"). Thus the art of cross-examination, so potent for good when fairly and properly used, plays havoc with hard-earned and well-deserved reputations in the hands of lawyers whose sole ambition it is to win.

Scientific opinion, to be of controlling value, can be given only under conditions of mental repose. The haggling, sharp interruptions, uncalled-for wit, insolent comment and the other too common features of important civil and criminal trials, are not such conditions. While they put some witnesses on their mettle, they throw the majority and the more competent into a state of mind in which all sorts of stupidities may be expected.

The Legislature cannot prohibit a party to an action from calling such witnesses to the facts of the case as he chooses, although it is within the discretion of the Trial Court to limit the number of expert witnesses; this discretion must always be judicially and not arbitrarily exercised, and, unless it affirmatively appears that it was abused, its exercise is not reviewable.

It should aways be borne in mind that the competency of a witness to testify to an opinion is a question of fact for the determination of the Court; but there must be a limit to the reception of expert testimony, for an army may be had if the Court will consent to their examination; and, if legal controversies are to be determined by the preponderance of voices, wealth in all litigations in which expert evidence is important may prevail almost as a matter of course.

If no limit be interposed, the little discrepancies that inevitably will be found in the testimony of those who in the main agree begin to attract the attention and to occupy the minds of the jury, until at last jurors, with their minds on unimportant variances, come to think that all expert testimony from its uncertainty is worthless.

Occasional lack of compentency and experience in judicial position is one of the misfortunes of our public life, but not less disastrous is the weakness of Judges who find it more agreeable to occupy the centre of a stage than to see that justice is carefully administered solely with regard to the rights of the individual and the State.

It is within the power of judges at *Nisi Prius* to require a greater degree of competency upon the part of persons claiming to be experts by the simple but effectual method of defining to a jury, with force and precision, the distinction between a witness proven to be thoroughly qualified to speak upon the subject regarding which his testimony is offered, and one whose claim to speak is predicated principally upon the fact that he is paid to do so.

If Trial Judges will pursue this course and are sustained in so doing by the Appellate Bench, courts of justice will be rid of corrupt and worthless so-called experts, provided the Judges themselves are animated solely by a wish to see justice properly administered.

Rhode Island and Michigan have attempted to remedy the

evil of corrupt and biased medical expert testimony by legislation; a similar attempt was made in Maine last winter, but an admirable law framed by Chief-Justice Emery of the Supreme Court of that State was rejected by the Legislature. At the annual meeting of the New York State Bar Association, in January, 1908, its then president, the Hon. Joseph H. Choate, handed to the writer a number of letters he had received upon the subject, and requested that it be brought to the attention of the Association. This was done, and the newly elected president, the Hon. Francis Lynde Stetson, appointed a committee of nine, one from each Judicial District of the State, to consider the matter, and to report to the Association at its annual meeting in January of this year. Of that committee I became chairman, and during my investigation of the subject corresponded with judicial and other officers in all our States, in England and the countries of the Continent of Europe, except Russia and Turkey. It is universally admitted that so grave a defect in the administration of justice should be remedied, and it is conceded that the defect is of such long standing that reform will be slow and difficult, largely because of the inertia of the Bar. I regret to say that I have found a greater degree of enthusiasm for better methods among physicians than among lawyers.

The Committee of the State Bar Association invited the cooperation of the New York State Medical Society (the allopathic school), of the Homeopathic Medical Society of the State, and of the New York Academy of Medicine. All appointed committees of distinguished physicians to confer with us. The result of our joint deliberation was approved by the Bar Association and all the medical organizations, and was presented to the Legislature of New York in the form of a bill which provided that the Justices of the Supreme Court assigned to the Appellate Divisions should designate at least ten, and not more than sixty, qualified physicians in each Judicial District who could be called as medical expert witnesses by the Court or by any party to a civil or criminal action, and who, when so called, should testify and be subject to examination and cross-examination as other witnesses are; that any designation might at any time be revoked without notice or cause shown, and any vacancy might at any time be filled; that when so directed by the Trial Court, witnesses so called should receive for their services and attendance

such sums as the presiding Judge should allow, to be at once paid by the fiscal officer of the County in which the trial is had, and that the act should not be construed as limiting the right of parties to call other expert witnesses as heretofore. The bill passed the Assembly, but failed in the Senate. It will be presented to the next Legislature, and it is hoped that it will become a law next winter. It is regarded by the Bench and Bar of many of the States as a long step towards the solution of a vexed and important problem.

There are cognate matters of which in passing it may be well to speak:

During and at the close of the trials of the People against Harris; the People against Patrick; the People against Molineux; and the People against Thaw, the newspapers (upon which in this century the majority of people rely for both facts and opinions) contained articles upon medical expert testimony, some of which were thoughtful and useful; many, although well intended, were lacking in accuracy; and a great number were replete with error—all doubtless were largely accepted as true. Among the erroneous views advanced were:

1. That the calling of expert medical witnesses is a custom of comparatively modern growth;

2. That the hypothetical question is a senseless, if not quite idiotic, method of obtaining the opinions of an expert:

3. That an admirable way of remedying the admitted evil would be to have the medical expert personally examine the subject, or, if the issue be insanity, the person involved, make his report to the Court in writing and have the Court submit the written report to the jury.

Fallacious as these views are known to be by the Bench and Bar, to a multitude outside the profession — perhaps to most laymen—they appeal with the force of fundamental truth.

A brief consideration of what is erroneous perhaps will not be amiss:

1. The custom of calling expert medical witnesses has the sanction of antiquity. By the Roman law, medical witnesses could be summoned by the judge at his discretion, and the Code framed by the Emperor Charles V, at Ratisbon in 1532, required the opinion of medical experts to be taken in cases where death was supposed to have been occasioned by violent means.

In 1606, Henry IV of France, in giving letters patent to his first physician, conferred on him the power of appointing two surgeons in every important town whose duty it should be to examine all wounded or murdered men and report thereon, and in 1692, by an order of the Council of State, it was ordained that physicians should be associated with the surgeons.

In England Mr. Justice Saunders said in 1553: "In matters arising in our law which concern sciences or faculties, particularly that of medicine, we apply for the aid of that science, which is an honored and commendable thing in our law, for thereby it appears that we do not despise other sciences, but we approve of them and encourage them as things worthy of commendation."

Cases are recorded in the Year Books from the beginning of the reign of Edward II (1307), to that of Henry VIII (1509), where the courts received the opinions of medical expert witnesses and of others learned in the sciences and arts.

2. The hypothetical question is the proper question to an expert. The criticism upon hypothetical questions addressed to expert witnesses is predicated upon a failure fully to consider or understand the reasons which require them. The ordinary witness testifies to facts, the expert witness to opinions. In testifying to a fact, a witness swears to something he has seen or heard, or the existence of which can be proved by the senses. An expert witness offers an opinion upon a given state of facts. He is not, and should not be, allowed to draw inferences or conclusions of fact from the evidence, nor is it proper to permit him to listen to the evidence of witnesses who testify as to facts and then to draw his inferences from so much of it as he can recall, because he may not be able to recall all the facts testified to or his construction of them may differ widely from the construction which should be put upon them. Therefore, when the facts are controverted, the only legal method is to frame a question upon the assumption that certain facts are true, and then to ask the witness, assuming they are true, his opinion regarding them. If the questioner exaggerates the facts or incorrectly states them, the opinion of the witness is of necessity erroneous, and the Court instructs the jury to disregard the opinion based upon them because the opinion is valueless unless the question fairly states and is fairly sustained by all the evidence in the case.

The form of question approved by courts is so shaped as not to give the expert any opportunity to mingle his opinion of the facts with the facts upon which he is asked to express an opinion. Thus, while a hypothetical question often seems involved, the method pursued is scientific and calculated to eliminate the element of error so far as it is possible so to do.

3. The suggestion that the evils complained of can be remedied by having the expert report to the Court in writing is untenable, because:

1st. The Sixth Amendment to the Federal Constitution and the Bills of Rights of the States provide that the accused, in all criminal prosecutions, has the right to be confronted with the witnesses against him;

2nd. Every party to an action, civil or criminal, has the constitutional right to call such witnesses as he may deem important to the maintenance of his cause, and the right to cross-examine those who may be called against him. In civil actions the deposition of witnesses whose attendance at the trial cannot be procured may be taken by commission, and on the application of the accused may so be taken in criminal actions, but the right to cross-examine remains.

It will be seen that Medical Expert Testimony long has been a necessary and always will be an important factor in the administration of Justice—the proper administration of which is the most important of temporal affairs. It will require time and effort to restore its sullied lustre, but the aim justifies the struggle.

ALPHONSO T. CLEARWATER.